IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 77-411

[redacted]

Petitioners

v.

[redacted]

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

BENJAMIN FRANKLIN BENNETT,
JAMES EDWIN ALLEN, CARL J.
WILLIAMS AND ELLERY JOHNSON ..... *Petitioners*

VS.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully ask that the Court issue a Writ of Certiorari to review the record and opinion of the United States Court of Appeals for the Eighth Circuit filed on August 17, 1977, confirming the conviction of Petitioners in the United States District Court, Eastern District of Arkansas, Western Division, before the Honorable G. Thomas Eisele.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the Appendix to this petition. The Opinion is dated August 17, 1977, No. 76-1557, and is not yet reported as of the date of this petition.

JURISDICTION

Petitioners were prosecuted and convicted for violation of 18 USC §1955. The convictions were appealed to the United States Court of Appeals for the Eighth Circuit and were affirmed. The United States Supreme Court has jurisdiction to grant the petition for Writ of Certiorari pursuant to 28 USC §1254 (1) which provides —

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following method —
>
> 1. By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The United States Supreme Court's jurisdiction on Writ of Certiorari is set forth at United States Supreme Court Rules, Rules 19-27.

QUESTIONS PRESENTED

Did the United States of America present insufficient evidence to establish the presence of five or more individuals "conducting" an illegal gambling business within the meaning of 18 USC §1955(b) (1)ii? Is a bystander, guest or casual employee a "conductor" within the meaning of the Act?

STATUTORY PROVISIONS INVOLVED

18 USC §1955 provides:

(a) Whoever conducts, finances, manages, supervises,

directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

STATEMENT OF THE CASE

The four petitioners were arrested on September 12, 1975, by FBI agents for suspected violations of 18 USC §1955 for con-

ducting bi-weekly dice games at the Springlake Club in Saline County, Arkansas. Three others were arrested along with Petitioners — Deward Wharton, Michael Childers and Nellie Jean Phinney.

In late July of 1975, Petitioner James Edwin Allen leased the Springlake Club. Allen combined thereafter with Petitioners Bennett and Williams to conduct crap games and the club was operative for that purpose for one month prior to petitioners' arrest. Petitioner Ellery Johnson was employed by the three other petitioners as a watchman due to their fear of robbery.

Petitioner Allen was convicted of a three count violation of 18 USC §1955 on April 8, 1976. Petitioner Bennett was convicted of a three count violation of 18 USC §1955 on April 23, 1976. Petitioner Williams was convicted of a five count violation of 18 USC §1955 and Petitioner Johnson was convicted of a three count violation on June 14, 1976. The government dismissed charges against Phinney, Wharton and Childers on June 22, 1976, stating —

> "for the reasons that the evidence adduced at four (4) trials previously held indicates that further prosecution is not warranted under the circumstances."

It is petitioners' contention that the evidence is insufficient to demonstrate that a fifth individual in addition to the four Petitioners was "conducting" an illegal gambling business within the meaning of 18 USC §1955. The Eighth Circuit Court of Appeals affirmed petitioners' convictions on the basis that the juries could have believed that either Phinney, Wharton, Childers or an unknown fourth person were "conducting" an illegal gambling business within the meaning of 18 USC 1955(b)

(1) ii, therefore, providing the fifth individual for purposes of 18 USC §1955. The evidence viewed in the light most favorable to appellee/respondent as reviewed by the Eighth Circuit Court of Appeals indicates that:

> (i) Nellie Jean Phinney served drinks, closed the door behind a customer and took a tip.
>
> (ii) Michael Childers, a customer, handled the stick briefly on one night, picked up trash in the room and watched the bathroom door.
>
> (iii) Deward Wharton handled the stick briefly on two nights.
>
> (iv) An unknown person helped work the table on one night in addition to Bennett, Allen and Williams.

Petitioners contend that such minimal peripheral activity by the four alleged participants from which the fifth conductor must be derived does not fall within the scope of 18 USC §1955.

REASONS FOR GRANTING THE WRIT

United States Supreme Court Rules, Rule 19(1)(b) lists the following as an important reason for review on Writ of Certiorari —

> "Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court."

Here, the important question of federal law unsettled by the United States Supreme Court deals with the meaning of the term "conduct" in 18 USC §1955(b)(1)ii. Petitioners contend that Congress did not intend the term "conduct" to include those activities of Phinney, Childers, Wharton, or the unknown fourth person upon which the Eighth Circuit Court of Appeals relied to complete the "five person" requirement of 18 USC §1955.

The meaning of the term "conduct" in 18 USC §1955 has been held to apply to persons who participate in the ownership, management or conduct of an illegal gambling business and reaches from high level bosses to street level employees. See *United States* v. *Smaldone*, 485 F. 2nd 1333 (1973), *United States* v. *Meese*, 479 F. 2nd 41 (8th Cir. 1973) and *United States* v. *Harris*, 460 F. 2nd 1041 (5th Cir. 1972) and report of the House Committee on the Judiciary, Report No. 91-1549, 91st Congress 2nd Session at 53. In *United States* v. *Sacco*, 491 F. 2nd 995, 1003 (9th Cir. 1974), cited in the instant case by the Eighth Circuit Court of Appeals, the Ninth Circuit Court of Appeals stated:

> "Each person, whatever his function, who plays an integral part in the maintenance of illegal gambling, conducts an (illegal gambling business) and is included within the scope of §1955, the sole exception is the player or bettor."

An even broader definition is found in *United States* v. *Harris*, 465 F. 2nd 1041, 1049 (5th Cir. 1972) where that Court held that "conduct" means to "operate, carry on, or cause to function." Or in *United States* v. *Leon*, 534 F. 2nd 667, 676, (6th Cir. 1976) where that Court stated that the term meant "any participant in the operation of the gambling business." See also, *United States* v. *Joseph*, 519 F. 2nd 1068 (5th Cir. 1975) and *United States*

v. *Bridges*, 493 F. 2nd 918 (5th Cir. 1974).

It is petitioners' contention that these decisions extend the definition of "conduct" to encompass activity never intended by Congress to be swept into §1955 and, specifically, that the activity of Phinney and/or Wharton and/or Childers and/or the unknown fourth person does not constitute conduct intended by Congress to be within the scope of §1955. As appropriately stated in the dissenting opinion in *United States* v. *Schaefer*, 510 F. 2nd 1307, 1315 (8th Cir. 1975) —

> "The legislative history of §1955 makes clear that Congress intended to limit the reach of §1955 to entities so large and continuous that they might rationally be presumed, at least as a class, to finance organized crime and hence to fall within federal jurisdiction and under the commerce power. To that end, the statute requires proof of the existence of a single 'illegal gambling business' involving five or more persons other than customers who 'conduct, finance, manage, supervise, direct or own' the business for at least thirty consecutive days. . . .
>
> The statutory language requiring proof that five or more persons conducted a single business commands evidence that each defendant acted in furtherance of the alleged joint business."

A footnote to the dissent states —

"The justification for federal jurisdiction is premised on the rational connection between large scale gambling and the flow of commerce. *United States* v. *Sacco*, 491 F. 2nd 995 (9th Cir. 1974). Thus, the constitutionality of the act rests

in large measure on its limited application to illegal operations of national concern, for the federal government now to expand the act's prohibitions to local activities is to betray the congressional purpose."

Further, legislative history reveals that —

"The intent of §1511 and §1955, is not to bring all illegal gambling activity within the control of the federal government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business type gambling operations of considerably greater magnitude than simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt state and local officials who make it possible for them to function." 2 U.S. Code Cong. Admin. News 1970 at 4029. See also, Senate Rep. No. 91-617 91st Cong. 1st Sess. 73 (1969).

The bill was once amended to exclude customers and bettors from the reach of §1955. As reviewed in *United States* v. *Thomas*, 508 F. 2nd 1200, 1204 —

"Thus, given the congressional emphasis on fairly large organized gambling operations and the exclusion of small-scale operations through the five-person minimum, it appears that Congress intended some gambling business to remain beyond the scope of the statute. Initially, proposed

§1955 (b) (1) ii defined 'illegal gambling business' to mean any part of an operation which 'involves five or more persons' who *participate* in the gambling activity." (emphasis added)

"It was subsequently amended and the bill reported by the House Judiciary Committee containing the final language of §1955 (b) (1) ii 'conduct, finance, manage, supervise, direct, or own all or part.' House Rep. at 12-13 1970 U.S. Code Cong. Admin. News at 4029. The amendment was apparently the result of objections by the Committee on Federal Legislation of the New York City Bar Association. The word 'participate' it was argued, could include even the customers of the gambling business, thereby bringing the federal power to bear against such small scale operations as 'Mom and Pop' bookmaking businesses having two owners and three customers. House hearings at 325-326. The final language is intended to exclude customers from the count of 'five or more.' House report at 53, 1970 U.S. Code Cong. & Admin. News at 4029."

Petitioners contend therefore that an important question of federal law dealing with the extent of the term "conduct" should be settled by this court. Petitioners conclude from the legislative history of §1955 that —

1. The federal law is only intended to reach gambling activity of major proportions and therefore of national concern.

2. Small scale operations were not the target of §1955.

3. Although the constitutionality of §1955 is not

challenged herein, there must be a rational connection between the activity §1955 is meant to control and the flow of interstate commerce.

Therefore, the legislative history of the bill is inconsistent with a broad definition of the term "conduct." As set forth in the cases cited above setting forth the definitions of "conduct," the various circuits have expanded the ambit of §1955 to potentially include activity of minor proportions and purely local concern and small scale operations and activity not demonstrating a rational connection with the control and flow of interstate commerce. Particularly, the Eighth Circuit in the instant case has included activity within §1955 which was not intended by Congress as prohibited conduct. The Eighth Circuit Court of Appeals in the instant case did so reluctantly —

> "Our affirmance is based on the law as we feel it applies to this case. We are appalled at the fact that this case was prosecuted by the United States Attorney rather than the local prosecutor. It obviously has taken a great deal of the government's time and the court's time to investigate, make a presentation to the grand jury, indict, try, re-try, and appeal this case. This Court feels reasonably certain that Congress did not intend that the United States should take jurisdiction over every local crap game 'conducted' by five persons, especially when some of the five participated in such a minor way as did Johnson and Phinney. This case could have been handled more expeditiously at the state court level." Opinion, at 12 see Appendix.

As long as the §1955 term "conduct" enjoys such an expanded definition, federal jurisdiction can reach every local crap game in which five persons participate exclusive of customers or bet-

tors. Such was not the intent of Congress.

The most acceptable judicial interpretation of "conduct" is, curiously, found in the Eighth Circuit's opinion in the instant case citing the *United States* v. *Sacco*, supra, definition limiting the term to those who "play an integral part in the maintenance of an illegal gambling business." None of the four individuals from whom the fifth person is derived herein "played an integral part." The crap game could have functioned perfectly well without the alleged "waitress" Nellie Jean Phinney. The game could have functioned without the two alleged relief men — Childers and Wharton — or the unknown fourth person. Any customer could have taken the stick in such an informal operation that did not demonstrate the characteristics of casino gambling. The individuals upon whom the court relied for the five-person requirement were not "integral" to the gambling business and any other interpretation conflicts with congressional intent. It is of particular significance in the instant case that the office of the United States Attorney evidently agreed with petitioners' position since the charges against Phinney, Wharton and Childers were dismissed on the basis that evidence at petitioners' trials led the United States Attorney to conclude that further prosecution was not warranted.

CONCLUSION

The Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit. Upon consideration the judgment should be reversed on the basis of petitioners' arguments herein.

Respectfully submitted,

Paul Johnson

J. H. Cottrell

L. Gene Worsham

PROOF OF SERVICE

I do hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the United States Attorney, Little Rock, Arkansas, and to the Solicitor General, Department of Justice, Washington, D.C., this 14th day of September, 1977, by depositing same in the United States mail with first class postage prepaid, and that all parties required to be served with a copy of this Petition have been served.

Paul Johnson

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 76-1448

United States of America,

Appellee,

v.

Benjamin Franklin Bennett,

Appellant.

No. 76-1453

United States of America,

Appellee,

v.

James Edwin Allen,

Appellant.

No. 76-1556

United States of America,

Appellee,

v.

Carl J. Williams,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas.

No. 76-1557

United States of America,

Appellee,

v.

Ellery Johnson,

Appellant.

Submitted: December 17, 1976

Filed: August 17, 1977

Before HEANEY and ROSS, Circuit Judges, and VAN PELT, Senior United States District Judge.*

PER CURIAM.

Appellants Bennett, Allen, Williams and Johnson appeal their jury convictions for violating 18 U.S.C. § 1955 which pertains to illegal gambling businesses. Appellants and three others (Deward Wharton, Michael Childers, and Nellie Jean Phinney) were indicted in a five count indictment[1] in the Eastern District of Arkansas. The five counts related to casino gambling (a dice table) conducted on five separate nights at the Spring Lake Club outside of Little Rock. There was a joint trial for six of the co-

*Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

[1]Not all co-defendants were named in each count of the indictment.

defendants which resulted in a hung jury. Thereafter, Allen was severed, retried and convicted on Counts III, IV and V and acquitted on Counts I and II. Appellant Bennett was severed, retried, convicted and acquitted on the same counts. A joint retrial was held as to Williams, Wharton, Phinney and Johnson. Williams was convicted on all five counts and Johnson was convicted on Counts III, IV, and V (the only counts with which he was charged). The jury was again unable to reach a verdict as to Phinney and Wharton. The government then elected to dismiss the charges against Phinney, Wharton and Childers.

Appellants' main contentions on appeal are:

1. That the evidence was insufficient to convict them under 18 U.S.C. § 1955; and

2. That the trial court erred in its instruction of the jury.

I. THE STATUTE AND ITS INTERPRETATION

By definition, an illegal gambling business which constitutes a violation of 18 U.S.C. § 1955:

> . . . involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business . . . .

Appellants Bennett, Allen and Williams admitted that they were conducting, financing, managing, and directing crap games on a partnership basis at the Spring Lake Club on the evenings of August 21 (Count I), August 26 (Count II), September 5 (Count III), September 10 (Count IV), and September 12 (Count V). Bennett, Allen

and Williams were aware they were violating state law. However, their only concern was not violating federal law. Bennett and Allen had read the federal statute. There was evidence in all three retrials that the partners were aware of the five person requirement and were determined not to violate it. See Allen Tr. IV at 62, 149; Bennett Tr. II at 224; Williams Tr. II at 370. Appellants contend the evidence did not show five persons were conducting[2] gambling and that certain jury instructions regarding the five person requirement were erroneous.

In order to solve the issues on appeal, we will first examine the law on what constitutes "conducting" a gambling business.

Our earlier opinions have examined the legislative history of § 1955 and concluded that the language of this section was specifically drafted so as to exclude customers or bettors. See United States v. Thomas, 508 F.2d 1200, 1205 (8th Cir.), cert. denied, 421 U.S. 947, 95 S.Ct. 1677, 44 L.Ed.2d 100 (1975); United States v. Schaefer, 510 F.2d 1307, 1311 (8th Cir.), cert. denied, 421 U.S. 978 (1975). Although the term "conduct" was not defined in § 1955, the legislative history shows 18 U.S.C. §§ 1511 and 1955 were enacted together as sections of the Organized Crime Control Act of 1970. Reading the two sections together provides a basis for excluding only bettors, since in enacting § 1511 Congress stated:

> The section applies generally to persons who participate in the ownership, management, or conduct of an illegal gambling business. The term "conducts" refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet.

[2]The government contended Phinney, Wharton, Childers, and Johnson were conducting gambling, and there was no claim that they financed, managed, supervised, directed or owned the business.

1970 United States Code Congressional and Administrative News at 4029. Several courts have held that anyone who participates in a gambling business other than a customer/bettor is counted as one of the five necessary persons conducting gambling. United States v. Becker, 461 F.2d 230, 232 (2d Cir. 1972), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2597, 41 L.Ed.2d 208 (1974); United States v. Ceraso, 467 F.2d 653 (3d Cir. 1972); United States v. Joseph, 519 F.2d 1068, 1071-72 (5th Cir. 1975), cert. denied, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976); United States v. Leon, 534 F.2d 667, 676 (6th Cir. 1976); United States v. Sacco, 491 F.2d 995, 1003 (9th Cir. 1974). The court in Sacco, supra, stated:

> Each person, whatever his function, who plays an integral part in the maintenance of illegal gambling, conducts an "illegal gambling business" and is included within the scope of § 1955. The sole exception is the player or bettor.

Id. at 1003. In United States v. Joseph, supra, the court found three defendants who helped a bookmaking operation by providing a line (point spread) and other gambling information as well as accepted bets from the operation which gave the operation a more favorable risk ratio could be counted toward the five person requirement. The court concluded that while the defendants

> . . . may not have been lay-off bettors, they were more than individual players or bettors and consciously aided in the conduct of the Victoria bookmaking business.

Id. at 1072. Our own circuit has repeatedly recognized that where

the illegal business is bookmaking a person who provides a regular and consistent market for lay-off betting is considered as aiding, conducting, and financing the illegal gambling business. See United States v. Brick, 502 F.2d 219 (8th Cir. 1974); United States v. Thomas, supra; United States v. Schaefer, supra; United States v. Bohn, 508 F.2d 1145 (8th Cir.), cert. denied, 421 U.S. 947, 95 S.Ct. 1676, 44 L.Ed.2d 100 (1975); United States v. Guzek, 527 F.2d 552 (8th Cir. 1975). The foregoing shows the scope of the Act with regard to conducting such business is quite broad.

II. THE JURY INSTRUCTIONS

Appellants contend the trial court's basic instructions on the five or more requirement,[3] given at each trial with only slight variations, were prejudicial in that they allowed a person

[3]Two instructions pointed out by appellants are the following:

> In determining the number of persons involved in the operation of the gambling business, you may include anyone who, on the day of the alleged offense, for gain, willfully associated with, and participated in, the operation of said business to the extent that he or she was willfully contributing or attempting to contribute to the success of the operation.
>
> * * *
>
> In calculating the minimum number of five persons required by the federal statute, a person may be included if he or she is employed by the business and intentionally performs an act or acts which, in fact, contribute or contributes to the operation of the gambling business or to its success, even if the evidence does not identify that person by name.

to be counted who had no authority to manage, supervise, direct or conduct the gambling operation. Initially we note that appellants made no objection to these instructions and under Fed. R. Crim. P. 30 are now precluded from raising any error with respect to them. United States v. Freeman, 514 F.2d 171, 174 (8th Cir. 1975); United States v. Cacioppo, 517 F.2d 22, 23-24 (8th Cir. 1975); United States v. Phillips, 522 F.2d 388, 390-91 (8th Cir. 1975). In light of the discussion in Section I of this opinion, we believe the instructions were accurate and that a person may be counted who contributes to the gambling operation without having any control of it.[4]

Appellants Johnson and Williams claim the trial court erred while reinstructing of the jury on the five or more requirement in answer to a jury question.[5] However, once again,

[4]See the suggested instruction on "conducting" in E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 61.05 (1977):

> The term, "conduct" as it is used in connection with the gambling business means to perform any act, function or duty which is necessary to or helpful in the ordinary operation of the business. A person may be found to conduct a gambling business even though he is a mere servant or employee, having no part in the management or control of the business and no share in the profits.
>
> A mere bettor or customer of a gambling business cannot properly be said to conduct the business. (emphasis added.)

[5]During the Williams trial, the jury during its deliberations sent a note to the court stating:

> We are confused and need to know whether or not there has to be five people conducting gambling on each night to find one guilty. We also need to be cleared up on conducting.

After conferring with counsel, the court endeavored first to

appellants are precluded from raising this as error under Fed. R. Crim. P. 30. The only objection made to the reinstruction of the jury was by Wharton's attorney who objected to the giving of any explanations to the jury other than the original instructions. No grounds were given for the objection as required by Rule 30. Appellants' attorney, who represented all other defendants, did not join in this objection or make any objection of his own. In counsel's discussion with the court as to what type of response to make to the jury's inquiry, appellants' counsel did state he preferred the instructions simply be reread. Williams Tr. III at 550. However, a comment merely stating a preference does not rise to the level of an objection. Willis v. United States, 530 F.2d 308, 311 (8th Cir.), cert. denied, 429 U.S. 838 (1976). We find no plain error. The evidence hereafter discussed was sufficient to show that five persons were involved in the operation of the gambling business here.

> What is required is that five or more persons be involved, not that five or more persons be indicted or convicted.

United States v. Calaway, 524 F.2d 609, 616 (9th Cir. 1975), cert. denied, 424 U.S. 967 (1976).

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5 continued

answer the jury's question directly, then reread the instructions relating to the offenses charged in each count, what the government was required to prove, and the determination of the five person requirement. After the rereading of these instructions, the court stated:

> I think you can see from the Court's instructions that you could include a person in meeting the five or more requirement that you did not feel was guilty of willfully and intentionally violating the statute and, therefore, would be not guilty, even though he or she would be counted in making the determination of five or more as required.

III. SUFFICIENCY OF THE EVIDENCE

Appellant Williams was the only person convicted of Counts I and II, and all four appellants were convicted on Counts III, IV and V. Although the evidence was conflicting in the lower court, we view it in the light most favorable to the government on appeal. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942).

As previously noted, there is no dispute over the fact Williams, Allen and Bennett were running the crap game on all five nights alleged in the five counts of the indictment. Jean Phinney was Carl Williams' girl friend and was also present each of the five nights. There was evidence that each of the nights in question she solicited and/or served free drinks at the crap table,[6] and on September 5 allowed persons to exit and enter the club, closing the door behind them.[7] There was

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[6]Only Williams was convicted on Counts I and II. Testimony concerning Phinney's serving of drinks is as follows for that trial:

August 21: Williams Tr. II at 184, 203
August 26: Williams Tr. II at 245, 232

For the remainder of the Counts, testimony may be found as follows:

September 5: Allen Tr. I at 70, II at 363-64; Bennett Tr. I at 44, II at 278; Williams Tr. I at 39

September 10: Allen Tr. II at 236-37, 263, 402; Bennett Tr. II at 266; Williams Tr. II at 203, 284

September 12: Allen Tr. II at 263, 402; Bennett Tr. I at 52, II at 266; Williams Tr. II at 203.

[7]Allen Tr. I at 52-53; Bennett Tr. I at 25-26; Williams Tr. I at 26-27, 38. Interestingly, Allen testified on cross-

also testimony that what appeared to be a "tip jar", a glass containing money, was placed on the bar and that Phinney was given money which she placed in the jar.[8] Her services allowed the gamblers to remain at the table and continue placing bets. There was no testimony Phinney ever participated as a player or bettor in the games and the jury could have concluded that she was performing a function helpful to the operation of the business. If Phinney is counted, then there are four of the requisite five persons on each night of the operation.

Through the testimony of Allen (at his own trial and Bennett's trial) and Williams, it was admitted that Ellery Johnson, Jean Phinney's son, was hired as a lookout or guard. He began work September 5 and worked the 10th and 12th and was to receive $20 per night for his services. The first two nights he was placed in a vehicle in the parking lot with an intercom system which he used on the night of the 10th to inform the partners of the presence of someone approaching the club. Thereafter, he was moved inside and on the night of the 12th was armed and placed in an upstairs room with the intercom. It is clear Johnson was employed by the gambling operation and was more than an innocent customer. Thus, the required five persons would be met for Counts III, IV and V. In addition, it

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7 continued

examination at his own trial that he scolded Phinney for opening the door because he didn't want her to participate or become involved in the operation. When Allen testified at Bennett's trial he stated his only concern was Phinney did not know the customers. Allen's memory was then refreshed with the transcript of the Allen trial.

[8]Phinney admitted placing $5 Agent Hale gave her in the jar but denied the $5 constituted a tip or that the jar and money in it belonged to her. It was defendants' theory throughout the trials that the jar merely contained money for the cigarette machine. However, the jury could have found otherwise.

is clear Childers handled the stick[9] on September 5, and Deward Wharton handled the stick on September 10 and 12. The testimony was in dispute as to how long they handled the stick and whether they were functioning as relief men for the operation or whether they were mere guests helping out. There was nothing to show they were ever paid for their services. However, the jury could have concluded that where the partners were aware of the five person requirement and determined to avoid violating federal law, there would be no record of payments (the evidence showed the operation made all payments in cash and had no checking account or formal bookkeeping system) and that the partners would want to use other personnel in the actual operation of the game as little as possible. Wharton was never a participant in the game, although he was in attendance on September 5, 10 and 12. There was testimony that Childers did not participate in the game as a customer or bettor on the night he handled the stick. Agent Gingerich testified at all three trials that Childers picked up trash from the room. Additionally, at the Bennett and Williams trials, Gingerich testified that Childers watched who came and went to the restroom and acted more or less as a guard or lookout following people who left the game.

Finally, there remains the question of whether the required five persons were conducting gambling on the nights of August 21, 1975 and August 26, 1975 in order to sustain Williams' conviction on Counts I and II. We have already noted four persons the jury could have counted. In addition, William Harkrider testified that on August 21 an unknown person in addition to Bennett, Allen and Williams worked the table. Sam Vogel testified that on August 26 Bennett, Allen and Williams, in addition to a fourth person, worked the table. If the jury believed

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[9]Handling the stick refers to a person using a curved stick to rake the dice to the person whose turn it is to shoot; the person raking the dice generally calls out the point and indicates which individuals won and lost on that roll of the dice.

this testimony, the five required persons were present even though they could not be identified.

Our affirmance is based on the law as we feel it applies to this case. We are appalled at the fact that this case was prosecuted by the United States Attorney rather than the local prosecutor. It obviously has taken a great deal of the government's time and the court's time to investigate, make a presentation to the grand jury, indict, try, retry, and appeal this case. This court feels reasonably certain that Congress did not intend that the United States should take jurisdiction over every local crap game "conducted" by five persons, especially when some of the five participated in such a minor way as did Johnson and Phinney. This case could have been handled more expeditiously at the state court level.

Federal courts are currently attempting to comply with the requirement that each federal criminal defendant receive a speedy trial. When United States Attorneys accept a case such as this, rather than letting local enforcement officials handle the matter, the objectives of the Speedy Trial Act are made more difficult to obtain; and the civil calendar of the Eastern District of Arkansas, already backed up because of a shortage of judges, is delayed even further.

For the foregoing reasons, appellants' convictions are hereby affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.